

the meaning of Sections 260 or 275 during the period at issue in the complaint. In addition, the plain language of Sections 260 and 275 indicate that Congress sought to enjoin only those activities that would cause material financial harm, rather than any financial harm whatsoever. Beyond these guidelines, we do not believe it necessary or appropriate to delineate specific factual situations that would satisfy this burden since the evidentiary proof of material financial harm will likely vary widely in different cases. We agree with PTG, SWBT, and USTA, however, that allegations of material financial harm should be supported by documentation and affidavits sufficient to enable the Commission to quantify such harm with reasonable certainty.

J. Damages

1. Bifurcation by the Commission and the Supplemental Complaint Process

a. The Notice

171. In the *Notice* we sought comment on whether the Commission legally could and/or should bifurcate liability and damages issues on its own motion in certain circumstances.⁴⁹⁸ In our experience, the damages phase of the formal complaint process is often cumbersome and protracted largely due to the scope and magnitude of discovery typically requested to substantiate or refute damages claims. The Commission noted that damages discovery is a waste of the time and resources of both the Commission and the parties when no violation or liability is found. The Commission further noted that the deadlines mandated by the new statutory complaint provisions allow very little time for complainants to present evidentiary arguments sufficient to establish both a violation of the Act and a proper measure of damages incurred as a consequence of such violation within the applicable deadlines. We stated in the *Notice* that our goal was to eliminate or minimize the delay that is often inherent in damages issues.

172. In the *Notice*, we proposed to encourage complainants to bifurcate voluntarily their liability and damages issues by reserving the right to voluntarily file a supplemental complaint for damages after liability has been determined.⁴⁹⁹ This procedure was available under the previous rule Section 1.722(b). Where a complainant voluntarily bifurcated a complaint proceeding using the supplemental complaint procedure, the Commission would defer adjudication of all damages issues until after a finding of liability. We proposed that a complainant's use of this provision in a formal complaint proceeding subject to a statutory deadline would enable the Commission to make a liability finding within such deadline and still preserve the complainant's right to establish a damage award under a less pressing schedule. We noted that, while bifurcation could result in a faster complaint proceeding if no liability were found, the overall proceeding could be significantly longer if liability was found and damages were decided in a second, separate proceeding. We emphasized, however, that complainants would want to avail themselves of the supplemental complaint bifurcation approach in most instances to avoid the possibility that the deadlines would not provide them with enough time to develop their damages claims. We noted that bifurcation through the voluntary supplemental complaint process would be particularly appropriate in those cases in which a complainant sought both prospective relief and damages incurred as the consequences of a defendant carrier's violation of the Act or a Commission rule or order. For example, we stated that a

⁴⁹⁸ *Notice* at 20852-53.

⁴⁹⁹ *Notice* at 20851-52.

decision by the Commission requiring a defendant carrier to terminate a particular practice or to provide service to a complainant under more reasonable terms and conditions would constitute a final, appealable order, as would a decision denying a complainant such relief. This would be the case even if issues of damages remained to be resolved as a result of the complainant's decision to file a supplemental complaint. We sought comment on the relative benefits to be gained by bifurcating liability and damages issues in Section 208 proceedings through complainants' voluntary use of the supplemental complaint process. We also asked parties to identify bifurcation standards that might help ensure that both liability and damages issues are fully resolved within the earliest practicable time frame.

b. Comments

173. Bell Atlantic and NYNEX comment that the Commission currently has the authority to bifurcate a complaint without the complainant's acquiescence.⁵⁰⁰ BellSouth argues that not all complaints are appropriate for bifurcation.⁵⁰¹

174. The majority of commenters support voluntary bifurcation of liability and damages issues.⁵⁰² CompTel, GST, ICG, KMC, MCI, MFS, TCG, and TRA support bifurcation only if it is voluntary.⁵⁰³ CompTel argues that forced bifurcation could impair a complainant's due process rights by causing undue delay.⁵⁰⁴ ICG argues that complainants need assurances that their damages claims will be resolved promptly following a finding of liability with expedited discovery.⁵⁰⁵ TRA argues that bifurcation should remain voluntary in light of the delay in recovering damages which is inherent in a bifurcated proceeding.⁵⁰⁶

175. CBT argues that bifurcation will reduce the time pressure of resolving claims within five months because each phase of the case will be simpler to deal with and, if liability is not established, the damages claim will no longer be at issue.⁵⁰⁷ CBT argues further that such bifurcation will result in a less compressed schedule and, therefore, increase discovery opportunities.⁵⁰⁸ CBT contends, however, that the

⁵⁰⁰ Joint Reply Comments at 6.

⁵⁰¹ BellSouth Comments at 18.

⁵⁰² AT&T Comments at 9; CBT Comments at 13-14; GTE Comments at 13; Nynex Comments at 12-13; SWBT Comments at 10; CompTel Comments at 9; GST Comments at 16-17; ICG Comments at 20; KMC Comments at 576; MCI Comments at 21; MFS Comments at 16-19; TCG Comments at 6; TRA Comments at 22.

⁵⁰³ CompTel Comments at 9; GST Comments at 16-17; ICG Comments at 20; KMC Comments at 576; MCI Comments at 21; MFS Comments at 16-19; TCG Comments at 6; TRA Comments at 22.

⁵⁰⁴ CompTel Comments at 9.

⁵⁰⁵ ICG Comments at 20-21.

⁵⁰⁶ TRA Comments at 22.

⁵⁰⁷ CBT Comments at 13-14.

⁵⁰⁸ CBT Comments at 13.

damages phase would still have to be resolved within the statutory deadline.⁵⁰⁹ GTE argues that b i f u r c a t i o n w i l l prevent the domination of discovery with damages issues.⁵¹⁰ GTE and NYNEX assert that once liability is found, a defendant will have more incentives to settle informally.⁵¹¹ NYNEX argues that the proposed bifurcation rules will make it easier for the Commission to resolve substantive liability issues within the statutory deadlines while preserving the rights of the parties to a full investigation into injury and damages.⁵¹² NYNEX further argues that bifurcation decreases unnecessary costs, as a complainant will not have to go through the expense of quantifying its damages until it has prevailed on liability.⁵¹³ TRA asserts that bifurcation benefits the parties because it will speed the resolution of liability issues and preclude unnecessary expenditures of time and resources.⁵¹⁴ SWBT contends that bifurcation will be beneficial to the parties because the substantial time required to resolve damages issues will not be wasted where no liability is found.⁵¹⁵ GST, KMC and MFS argue that bifurcation benefits the parties because the extensive discovery required for damages issues will not be unnecessarily undertaken if no liability is established.⁵¹⁶

176. MCI argues that the statutory deadline for a particular formal complaint should be applied separately to each phase because otherwise the parties would not have sufficient time to develop their cases fully.⁵¹⁷ TRA asserts that bifurcation effectively waives any statutory deadline with regard to damages issues.⁵¹⁸ TCG argues that bifurcation will enable the Commission to make a liability finding within the statutory deadlines and preserve a complainant's right to a damages award.⁵¹⁹

177. PTG, GST, and Ameritech seek clarification that a complainant must establish "injury" for a finding of liability to proceed to the damages phase in a bifurcated proceeding.⁵²⁰ PTG argues that

⁵⁰⁹ CBT Comments at 14.

⁵¹⁰ GTE Comments at 13.

⁵¹¹ GTE Comments at 13; Nynex Comments at 13.

⁵¹² Nynex Comments at 12-13.

⁵¹³ Nynex Comments at 13.

⁵¹⁴ Nynex Comments at 13.

⁵¹⁵ SWBT Comments at 10.

⁵¹⁶ GST Comments at 16; KMC Comments at 16; MFS Comments at 16.

⁵¹⁷ MCI Comments at 21-22.

⁵¹⁸ TRA Comments at 22.

⁵¹⁹ TCG Comments at 6.

⁵²⁰ PTG Comments at 25-26; GST Comments at 19; Ameritech Comments at 12-13.

"injury" is a necessary element of liability, however, it is not interchangeable with "damages" which are the quantification of losses that result from an injury.⁵²¹

c. Discussion

178. We find that the Commission has discretion to bifurcate liability and damages issues on its own motion pursuant to Section 208(a) of the Act. Section 208(a) authorizes the Commission "to investigate . . . matters complained of in such manner and by such means as it shall deem proper." We note, however, that the Commission only has such discretion to the extent that such bifurcation will not violate the statutory deadline applicable to the complaint as filed. Therefore, all claims, that are subject to a statutory complaint resolution deadline and include a properly supported request for damages, require that the Commission issue a final order within the deadline on both the liability and damages claims.

179. However, we both permit and encourage complainants to use the supplemental complaint procedures to separate liability and damages issues voluntarily such that damages issues will be resolved in separate formal complaints. By using the term "bifurcate" in connection with the supplemental complaint procedures, we contemplate the filing of two separate complaints: (1) the initial complaint for liability and any applicable prospective relief; and (2) the supplemental complaint for damages. Resolution of the liability and prospective relief issues on the complaint that only seeks a determination of those issues complies with the applicable statutory deadline because such a determination resolves all issues properly brought before the Commission. The damages issues will not have been brought before the Commission until, and unless, the supplemental complaint for damages is actually filed. We modify Section 1.722 of the rules to clarify this procedure.⁵²²

180. Given the new complaint provisions, requiring final Commission orders resolving certain complaints within specified time frames, encouraging the parties to separate their liability and damages claims into separate complaints is the most practical means to focus scarce resources on the determination of liability issues and, when necessary, granting prospective relief quickly. In addition, in cases where no liability has been found, significant resources will have been saved as a damages complaint will not have been necessary. Promoting voluntary separation of liability and damages issues is consistent with the pro-competitive goals and policies underlying the 1996 Act's complaint resolution deadlines and will not adversely affect the Commission's ability to resolve complaints raising competitive and other marketplace disputes on an expedited basis. On the contrary, such separation will enable the Commission and the parties to focus initial resources on addressing allegations of anti-competitive conduct and any necessity for prospective injunctive relief.

181. We disagree with CBT's assertion that a complainant should be required to prosecute its liability and damages claims in a single complaint. Nothing in the Act prohibits a complainant from choosing to bring its liability and damages claims in separate complaints. The supplemental complaint process is voluntary and the decision to pursue damages in a separate proceeding is made solely by the complainant. Further, the Commission has no basis on which to make a finding regarding damages if such claims have not yet been presented by the complainant. Thus, a decision on a liability complaint that

⁵²¹ PTG Comments at 25-26.

⁵²² See Appendix A, § 1.722(b)(2), (3).

reserves the right to file a supplemental complaint for damages is a final decision on all matters the complainant has presented to the Commission in its complaint.

182. As a policy matter, we note that a notice of intent to seek damages in a supplemental complaint contained in a complaint for liability has the effect of tolling the statute of limitations for damages claims.⁵²³ Moreover, a complainant may file a supplemental complaint for damages following a finding of liability even if it gave no notice of such intent at the time it filed its original complaint.⁵²⁴ Thus, the distinction between the treatment of a supplemental complaint for damages when the complainant gave notice of its intent to file such supplemental complaint in its complaint for liability and when the complainant failed to give notice of its intent to file such supplemental complaint in its complaint for liability is solely the period of time for which damages may be assessed against a defendant. Under the circumstances, a rule that would require complainants to prosecute damages within the statutory deadline, regardless of whether the complainant chose to reserve its right to file a supplemental complaint for damages, would, in fact, shorten the statute of limitations for bringing complaints for damages in those complaints that are subject to a statutory resolution deadline. We do not find that it was the intent of Congress to limit the rights of complainants in this manner.

183. We find that complainants will elect to pursue their liability and damages claims in separate proceedings because it will be to their advantage to postpone expending time and money developing proof of their damages claims until after liability and issues of prospective relief have been established. Complainants will also benefit from being provided an extended period within which to support their damages claims factually. Most importantly, complainants will benefit from swifter resolution of liability issues through the filing of separate complaints for the resolution of liability and damages issues, and, therefore, swifter provision of the prospective relief needed to halt allegedly anti-competitive conduct. For this reason, the provision in the rules for complainants to file such separate complaints is consistent with the Act's goal of timely resolution of competitive issues to open markets for all potential entrants and competitors, not just the parties to the complaint.

184. We also recognize the importance of swift resolution of damages complaints once the liability of a defendant carrier has been established. We agree with commenters who argue that many complainants will bifurcate liability and damages claims only if they expect that the Commission will conclude the damages phase rapidly. While we believe that parties will benefit substantially from complaint bifurcation in many instances, rules and policies must be in place to ensure resolution of damages complaints promptly and effectively. A paramount concern of a complainant seeking damages is to obtain monetary relief for harm suffered as a consequence of the defendant carrier's actions. Similarly, defendant carriers have an interest in quickly resolving any uncertainty about the amount or extent of their damages liability. Therefore, we will endeavor to resolve supplemental damages complaints in the same length of time within which the liability phase was resolved. As a general rule, damages proceedings will be resolved within the same amount of time required to rule on the preceding liability complaint. For example, a provider of alarm monitoring services that elects to file a supplemental complaint for damages, based on a finding by the Commission that the defendant carrier is liable for a violation of Section 275 of the Act, can reasonably expect to have its damages claims resolved within a

⁵²³ See Appendix A, § 1.722(b)(2); 47 U.S.C. § 415.

⁵²⁴ See Appendix A, § 1.722(b)(1).

similar 120-day period.⁵²⁵ In addition, with respect to supplemental complaints for damages that are filed following a finding of liability on a matter that was not subject to a statutory deadline, we will endeavor to resolve such complaints within five months of the date of filing. This approach furthers the intent underlying the deadlines that Congress established for different types of complaints. Establishing rules and policies that promote swift determination of damages claims provides a significant incentive for common carriers to comply with the Act and the Commission's rules and orders. It also gives all complainants reasonable assurances of the length of time a damages phase is likely to take. Such information will help parties that plan to seek damages weigh the benefits of bifurcating the liability and damages aspects of their claims prior to filing a complaint with the Commission.

185. We also recognize that damages complaints often raise issues of extraordinary factual and/or legal complexity, the resolution of which may require substantial expenditures of time and resources by the parties. In the paragraphs below,⁵²⁶ we discuss rules that are designed to facilitate the computation of damages by complainants and defendants and promote the prompt resolution of damages disputes. We believe that these rules will help us attain our goal of resolving all damages complaints within five months from the date filed. Nonetheless, we believe that cases of extraordinary complexity could require substantially more time. As a general rule, we will endeavor to resolve such complex complaints within twelve months from the date filed.

186. We recognize the distinction commenters make between "injury" and "damages," and agree that a party that has not shown that it suffered an injury has not met a threshold requirement for substantiating a claim for damages. We disagree, however, with the assertion by these commenters that a determination of "injury" in a liability complaint is necessary to proceed to a supplemental complaint for damages when a complainant chooses to use the supplemental complaint procedures. Contrary to the commenters' claims, proof of "injury" is not necessary to establish a violation of the Act within the meaning of Section 208.⁵²⁷ Section 208 of the Act only requires proof that the defendant carrier has violated the Act or a Commission rule or order for a complainant to prevail.⁵²⁸ Additionally, determining whether an individual complainant has been injured and is entitled to monetary damages does not further the pro-competitive goals and policies underlying the 1996 Act in the same way that addressing allegations of anti-competitive conduct and the need for injunctive relief does. That is, the question of injury goes to the resolution of an individual dispute rather than the resolution of a disputed issue that affects competition in an industry. For that reason, we conclude that, where the fact of injury does not need to be established to prevail on the issue of liability in a complaint proceeding, a prior determination of injury is not a prerequisite to the filing of a supplemental complaint for damages. A complainant must always,

⁵²⁵ See 47 U.S.C. § 275(c).

⁵²⁶ See *supra* "Ending Adjudication with a Determination of the Sufficiency of a Damages Calculation Method," "Settlement Period," "Referral of Damages Issues," and "Deposit of Funds into an Escrow Account" sections.

⁵²⁷ "No complaint shall at any time be dismissed because of the absence of direct damages to the complainant." 47 U.S.C. § 208.

⁵²⁸ 47 U.S.C. § 208. In those cases in which the complainant fails to sustain its burden of proving a violation of the Act, there would obviously be no basis for a supplemental complaint for damages.

however, prove injury and quantify its monetary damages with reasonable certainty to prevail on its claim for damages.

2. Detailed Computation of Damages

a. The Notice

187. In the *Notice* we proposed to require that any complaint or supplemental complaint seeking an award of damages contain a detailed computation for such claim.⁵²⁹ That is, every complaint for damages would include a computation for every category of damages claimed, as well as identification of all documents or material on which such computation was based.⁵³⁰ For example, in cases in which a complainant is challenging the reasonableness of charges or rate levels applied by a carrier to particular services taken by the complainant, the complainant's computations would have to identify clearly the precise nature of the service taken and applicable charges broken down by such factors as minutes of use, traffic mileage and volume, as well as any applicable discounts or other adjustment factors.

b. Comments

188. ACTA, BellSouth, CBT, GST, KMC, MFS, NYNEX, and U S West support requiring complaints seeking an award of damages to contain a detailed computation of damages claimed.⁵³¹ SWBT asserts that such a requirement should reduce the filing of frivolous claims for speculative damages that are not subject to proof.⁵³² GST, KMC and MFS argue that such a requirement should encourage settlement by clarifying a party's claim.⁵³³ The cable entities and MCI oppose such a requirement, expressing concern that complainants may not have access to sufficient information prior to discovery to prepare and submit detailed damages computations or computation formulas.⁵³⁴

189. ICG argues that the proposed detailed computation of damages should only be required to be made in good faith and that complainants should be provided with the opportunity to amend the complaint to reflect an updated computation of damages following discovery.⁵³⁵ MCI argues that requiring the complaint to contain a detailed computation of damages would violate a complainant's due process rights and suggests, as an alternative, requiring a complainant to outline its damages methodology and

⁵²⁹ *Notice* at 20853.

⁵³⁰ *Notice* at 20853-54.

⁵³¹ ACTA Comments at 8; BellSouth Comments at 18; CBT Comments at 14; GST Comments at 17; KMC Comments at 17; MFS Comments at 17; NYNEX Comments at 12-13; U S West Comments at 9.

⁵³² SWBT Comments at 10.

⁵³³ GST Comments at 16; KMC Comments at 16; MFS Comments at 16.

⁵³⁴ Cable Entities Reply at 13 n.20; MCI Comments at 22.

⁵³⁵ ICG Reply at 12.

identify what damages information it lacks.⁵³⁶ While they do not oppose the proposed requirement that a complaint contain a detailed computation of damages, U S West argues that the Commission must take into account the reasonable availability of necessary information,⁵³⁷ and TRA asserts that the Commission must be careful not to impose an overly rigid or binding requirement with regard to a detailed or definitive damages calculation prior to the receipt of an answer and completion of discovery.⁵³⁸

c. Discussion

190. After considering the concerns raised by the commenters, we modify the proposed rule. We require that a complainant seeking damages must file in its complaint or supplemental complaint either a detailed computation of damages or a detailed explanation of why such a computation is not possible at the time of filing.⁵³⁹ Commenters raise valid concerns about the ability of complainants to substantiate damages claims at the beginning of a formal complaint proceeding. In light of these considerations, we require all complaints or supplemental complaints seeking an award of damages to contain either:

- a) A detailed computation of damages, including supporting documentation and materials;
or
- b) An explanation of:
 - (i) What information not in the possession of the complaining party is necessary to develop a detailed computation of damages;
 - (ii) Why such information is unavailable to the complaining party;
 - (iii) The factual basis the complainant has for believing that such evidence of damages exists; and
 - (iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.⁵⁴⁰

191. This rule strikes the appropriate balance between the need for complainants to be diligent in establishing their claims and our recognition that, in certain instances, a complainant may not possess sufficient facts at the initial stages of a complaint proceeding to prepare a detailed computation of damages alleged. This rule also is consistent with the Commission's adoption of a policy of encouraging complainants to have damages claims resolved separately from liability issues using the supplemental complaint process, because it provides the complainant with the benefit of additional time to develop and

⁵³⁶ MCI Comments at 22.

⁵³⁷ U S West Comments at 10.

⁵³⁸ TRA Comments at 22-23.

⁵³⁹ See Appendix A, § 1.722(c).

⁵⁴⁰ See Appendix A, § 1.722(c).

support factually an accurate computation of damages following a finding of liability. It would have been unduly burdensome to require a complainant who has been unable to obtain access to substantiating information, after it has made good faith efforts to obtain such information, to support factually its damages claim without providing a means to substantiate such claims. Further, such a rule would have reduced the incentives on defendants to negotiate damages issues in good faith.

3. Ending Adjudication With a Determination of the Sufficiency of a Damages Calculation Method

a. The Notice

192. In the *Notice* we proposed that the Commission's adjudication of damages should end with a determination of the sufficiency of the computation method submitted by the complainant, instead of making a finding as to the exact amount of damages incurred.⁵⁴¹ We stated that the benefit of such a procedure would be that the Commission would be spared the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages.⁵⁴² As an example of how such a procedure would be implemented, we noted that a similar procedure is used in complaints dealing with pole attachments.⁵⁴³ We sought comment on this proposal.

b. Comments

193. CBT, CompTel, GST, and SWBT oppose a rule ending the Commission's adjudication of damages with a determination of the sufficiency of the computation method.⁵⁴⁴ CBT and CompTel argue that parties will be unable to resolve issues remaining in dispute, such as the numbers to be plugged into an approved method.⁵⁴⁵ CBT argues that such disputes will require further Commission involvement to resolve.⁵⁴⁶ GST argues that parties are entitled to a final resolution of all substantive issues, a category it contends includes the actual amount of damages incurred.⁵⁴⁷ SWBT argues that because such a procedure would not require a complainant to meet its burden of proof, it would be a denial of a

⁵⁴¹ *Notice* at 20854.

⁵⁴² *Notice* at 20854.

⁵⁴³ *Notice* at 20854; *see also* 47 C.F.R. § 1.1404(g).

⁵⁴⁴ CBT Comments at 14; CompTel Comments at 9-10; GST Comments at 17-18; SWBT Comments at 10-11.

⁵⁴⁵ CBT Comments at 14; CompTel Comments at 9-10.

⁵⁴⁶ CBT Comments at 14.

⁵⁴⁷ GST Comments at 18.

defendant's due process rights.⁵⁴⁸ AT&T supports this proposal if the Commission remains available to resolve further disputes among the parties and provide a final resolution if the parties cannot agree to one.⁵⁴⁹

c. Discussion

194. In cases where liability and damages claims have been severed using the supplemental complaint process,⁵⁵⁰ the Commission may end adjudication of damages with a determination of the sufficiency of the damages computation method submitted by the complainant.⁵⁵¹ After considering the concerns raised by the commenters, we modify the proposed rule to reflect that if the Commission finds the damages computation submitted by the complainant unsatisfactory, the Commission may, in its discretion, modify such computation method or require the complainant to resubmit such computation.⁵⁵² In addition, the rule specifically prohibits the computation method from incorporating an offset for a claim of a defendant against a complainant.⁵⁵³ To ensure the parties are diligent in their negotiations to apply the approved calculation method, we shall require that, within thirty days of the date the damages computation method is approved and released, the parties must file with the Commission a joint statement which will do one of the following: (1) detail the parties' agreement as to the amount of damages; (2) state that the parties are continuing to negotiate in good faith and request that the parties be given an extension of time to continue such negotiations, or (3) detail the bases for the continuing dispute and the reasons why no agreement can be reached.⁵⁵⁴ In this way, the Commission will monitor the parties' compliance with its directive to negotiate a resolution of the dispute in good faith using the mandated computation method.

195. This rule permits the Commission to avoid the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages where such investigation may reasonably be delegated to the parties. At the same time, however, it provides a means for parties to return to the Commission for resolution of ongoing disputes if parties are unable to agree to a final amount of damages. This rule encourages good faith negotiation among the parties by requiring parties to provide detailed explanations if they fail to resolve their dispute. We emphasize that the Commission will always retain the right to determine the actual amount of damages in those cases where the establishment of damages does not lend itself to such a means of resolution. We also conclude that requiring parties to reach an

⁵⁴⁸ SWBT Comments at 10-11.

⁵⁴⁹ AT&T Comments at 12.

⁵⁵⁰ We note that this methodology is designed for use with the supplemental complaint process and, therefore, an order determining the sufficiency of a damages computation method would not satisfy the requirement of a final order where a damages claim is subject to a statutory deadline.

⁵⁵¹ See Appendix A, § 1.722(e).

⁵⁵² See Appendix A, § 1.722(e).

⁵⁵³ See Appendix A, § 1.722(e).

⁵⁵⁴ See Appendix A, § 1.722(e).

agreement within a limited time addresses the concerns raised by some commenters that the parties would have no recourse if they are unable to apply a damages computation method successfully.

4. Settlement Period

a. The Notice

196. In the *Notice* we proposed, in conjunction with the proposals to resolve liability and damages claims separately using the supplemental complaint process, to set aside a limited period, following a finding of liability and prior to the damages phase, during which the parties could engage in settlement negotiations or submit their damages claims to voluntary ADR mechanisms in lieu of further proceedings before the Commission.⁵⁵⁵

b. Comments

197. GST, SWBT, TRA and U S West support setting aside a limited time period, following a finding of liability, in which to encourage settlement and/or participation in ADR.⁵⁵⁶ SWBT asserts that a finding of liability increases the defendant's incentive to settle.⁵⁵⁷ U S West argues that the Commission does not go far enough and that ADR procedures should be used wherever possible to resolve entire complaints.⁵⁵⁸

c. Discussion

198. In cases where liability and damages claims have been severed using the supplemental complaint process, the Commission may suspend proceedings for a period of fourteen days following the filing of a supplemental complaint for damages, to allow parties to attempt to negotiate a settlement or use ADR procedures.⁵⁵⁹ The staff has the discretion to delay this period until later in the damages phase, when warranted by the facts of an individual case.⁵⁶⁰

199. Encouraging parties to settle their disputes is in the interests of the Commission and the parties. Commenting parties recognize the benefits of settlements reached by the parties and support the establishment of this settlement period to further settlement negotiations. The timing of this settlement

⁵⁵⁵ *Notice* at 20854.

⁵⁵⁶ GST Comments at 18; SWBT Comments at 10; TRA Comments at 23; U S West Comments at 6.

⁵⁵⁷ SWBT Comments at 10.

⁵⁵⁸ U S West Comments at 6.

⁵⁵⁹ See Appendix A, § 1.722(d)(3). To the extent that parties may wish to conduct settlement negotiations prior to the filing of a supplemental complaint for damages, we encourage this and note that the supplemental complaint rules provide that a complainant has sixty days to file its supplemental complaint for damages following public notice of a decision on the merits of the original complaint. See Appendix A, § 1.722(b)(2)(ii).

⁵⁶⁰ See Appendix A, § 1.722(d)(3).

period is especially useful because it follows the determination of liability. A finding of liability will increase the parties' incentives to settle, as a major issue formerly in dispute will have been resolved. We recognize, however, that information disclosures may be necessary in some cases for parties to assess adequately the amount of damages incurred. In such cases, a settlement period immediately following the filing of the supplemental complaint for damages may be too early in the proceeding to be useful. Providing the staff with the discretion to delay the settlement period until after information disclosures have been made maximizes the Commission's ability to encourage settlement on a case-by-case basis.

5. Referral of Damages Issues

a. The Notice

200. In conjunction with the proposals to resolve liability and damages claims separately using the supplemental complaint process, we sought comment on the benefits of referring damages issues to ALJs for either decision following a finding of liability or, by agreement of the parties, mediation.⁵⁶¹ We noted that such referral would be at the discretion of the Commission staff pursuant to delegated authority, depending on the particular facts and circumstances involved.⁵⁶² We also sought alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.⁵⁶³

b. Comments

201. Commenters generally support the referral of damages issues to ALJs.⁵⁶⁴ ICG compared this procedure to the federal courts' use of special masters.⁵⁶⁵ BellSouth suggests that parties should have the option of mediation or referral to a special master.⁵⁶⁶ KMC asserts that parties need to have the right to appeal any decision on damages made by an ALJ.⁵⁶⁷ GTE argues that the ALJ should have the authority to request production of evidence.⁵⁶⁸ GTE seeks clarification that an ALJ's authority would be restricted to the resolution of damages issues.⁵⁶⁹

⁵⁶¹ Notice at 20854.

⁵⁶² Notice at 20854.

⁵⁶³ Notice at 20855.

⁵⁶⁴ AT&T Comments at 10; BellSouth Comments at 18; GST Comments at 18; GTE Comments at 13; KMC Comments at 18; MFS Comments at 18; SWBT Comments at 10; TRA Comments at 23; U S West Comments at 7-8.

⁵⁶⁵ ICG Comments at 21.

⁵⁶⁶ BellSouth Comments at 18.

⁵⁶⁷ KMC Comments at 18.

⁵⁶⁸ GTE Comments at 13.

⁵⁶⁹ GTE Comments at 13.

c. Discussion

202. We adopt a rule authorizing the Chiefs of the Common Carrier Bureau and Wireless Telecommunications Bureau to refer damages disputes to ALJs for either decision following a finding of liability or, by agreement of the parties, mediation.⁵⁷⁰ This rule would work in conjunction with cases in which liability and damages claims have been severed using the supplemental complaint process. The commenters generally support the use of ALJs to resolve damages issues. We conclude, despite GTE's concerns regarding the authority of ALJs in damages hearings, that special rules or procedures are not needed to guide the ALJs in their deliberations given the narrow focus of damages proceedings. The hearing rules provide for the designation of specific issues in the hearing designation order.⁵⁷¹ Once liability has been determined, the question of damages is largely a factual one. ALJs are expert triers of fact well suited to conduct fact-finding proceedings. Regarding appeals of ALJ decisions, we note that the ALJ hearing rules provide the means for parties to seek review of an ALJ decision.⁵⁷² If the parties agree to mediation, however, the right to seek review of the ALJ's mediation resolution would be contained within the terms pursuant to which the parties agreed to such mediation.

6. Deposit of Funds into an Escrow Account

a. The Notice

203. In the *Notice* we proposed that the Commission be given discretion to require a defendant to place a deposit in an interest-bearing escrow account following a finding of liability in cases in which liability and damages claims have been severed using the supplemental complaint process.⁵⁷³ The purpose of such a deposit would be to cover all or part of the damages for which the defendant carrier may be found liable in order to provide a complainant with some assurance that a judgment can be readily collected.⁵⁷⁴ We proposed that, in exercising this discretion, the Commission would apply standards similar to those used to determine whether a preliminary injunction is appropriate.⁵⁷⁵ We emphasized that the Commission would not administer any such account.⁵⁷⁶ We sought comment on this proposal as well as alternative proposals that would serve to facilitate and expedite the resolution of damages claims.⁵⁷⁷

⁵⁷⁰ See Appendix A, § 1.722(d)(1).

⁵⁷¹ 47 C.F.R. § 1.221.

⁵⁷² 47 C.F.R. §§ 1.271-1.282.

⁵⁷³ *Notice* at 20855.

⁵⁷⁴ *Notice* at 20855.

⁵⁷⁵ *Notice* at 20855.

⁵⁷⁶ *Notice* at 20855.

⁵⁷⁷ *Notice* at 20855.

b. Comments

204. Commenters are split over whether or not the Commission could or should require the deposit of funds into an escrow account following a finding of liability. AT&T, TRA, GST, KMC and MFS support such a procedure.⁵⁷⁸ AT&T, GST, KMC and MFS further support allowing the posting of a bond as an alternative to depositing funds into an escrow account as a means to ensure payment.⁵⁷⁹ GST, KMC, and MFS argue that preliminary injunction standards do not need to be met to require such a bond because liability will already have been determined.⁵⁸⁰ GST, KMC, and MFS argue that the Commission should require a showing of irreparable harm and the likelihood that the defendant will default on the damages award before requiring the posting of a bond or the deposit of funds into an escrow account.⁵⁸¹

205. CBT, SWBT, GTE, and PTG oppose the proposal, arguing that the Commission lacks authority to impose such a requirement.⁵⁸² CBT, SWBT, and PTG argue that a Commission order for payment of damages pursuant to Section 209 of the Act is not an enforceable money judgment.⁵⁸³ CBT and SWBT argue that prospective money damages are insufficient to justify a preliminary injunction, and that the proper compensation for any delay in a damages award is the payment of interest.⁵⁸⁴ PTG asserts that such a rule creates an unnecessary administrative burden in light of the fact that there is no evidence of a problem in collecting damages from carriers.⁵⁸⁵

c. Discussion

206. In cases in which liability and damages claims have been severed using the supplemental complaint process, following a finding of liability, the Commission shall have discretion to require a defendant either to post a bond for, or place in an escrow account, an amount the Commission determines is likely to be awarded, if such relief is justified following consideration of the following factors:

- a) The likelihood of irreparable injury in the absence of such a deposit;
- b) The extent to which damages can be accurately estimated;

⁵⁷⁸ AT&T Comments at 10; TRA Comments at 23; GST Comments at 18; KMC Comments at 18; MFS Comments at 18.

⁵⁷⁹ AT&T Comments at 10; GST Comments at 18; KMC Comments at 18; MFS Comments at 18.

⁵⁸⁰ GST Comments at 18; KMC Comments at 18; MFS Comments at 18.

⁵⁸¹ GST Comments at 18; KMC Comments at 18; MFS Comments at 18.

⁵⁸² CBT Comments at 14; SWBT Comments at 11; GTE Reply at 5; PTG Comments at 26-27.

⁵⁸³ CBT comments at 14; SWBT Comments at 11; PTG Comments at 26-27.

⁵⁸⁴ CBT Comments at 6; SWBT Comments at 11.

⁵⁸⁵ PTG Comments at 26-27.

- c) The balance of hardships between complainant and defendant; and
- d) Whether public interest considerations favor the posting of a bond or establishment of an escrow account.⁵⁸⁶

207. Requiring the posting of a bond or the deposit of funds into an escrow account both protects against a defendant's future inability to satisfy an enforceable judgment and removes the benefit a defendant receives from delaying payment in a case. Contrary to what several commenters suggest, neither the posting of a bond nor the deposit of funds into an escrow account is the enforcement of a money judgment. The rule does not provide that a complainant may execute its judgment on the bond or account following a Commission order of damages. The rule merely requires the bond or account to be set up as a protective measure. Further, this protective measure may only be taken following a finding of liability and a Commission assessment of likely damages.

208. Precedent for the Commission requiring a defendant to deposit funds into an escrow account following a determination of liability is found in *Western Union Telegraph Co. v. TRT Telecommunications Corp.*, and *FTC Communications, Inc.*⁵⁸⁷

7. Additional Suggestions From Commenters

a. The Notice

209. In the *Notice* we sought alternative proposals that would serve to facilitate and expedite the resolution of damages claims and/or minimize or reduce the need for costly and protracted proceedings on the issue of damages.⁵⁸⁸

b. Comments

210. ACTA suggests that the Commission codify the procedure for a complainant to litigate damages in federal court following a finding of liability by the Commission.⁵⁸⁹

211. GST suggests providing for targeted discovery during a damages phase, arguing such discovery should be limited to initial disclosures of witnesses, exchange of documents and one deposition for each party.⁵⁹⁰

⁵⁸⁶ See Appendix A, § 1.722(d)(2).

⁵⁸⁷ Memorandum and Order, 11 FCC Rcd 13689 (1996).

⁵⁸⁸ *Notice* at 20855.

⁵⁸⁹ ACTA Comments at 8.

⁵⁹⁰ GST Comments at 16017.

c. Discussion

212. We decline to adopt ACTA's proposal to codify a procedure for litigating damages claims in federal court following a finding of liability by the Commission. The Act does not provide the Commission with the authority to establish federal court procedures. Although federal courts occasionally refer cases to the Commission for resolution of liability issues, while retaining authority over damages issues pending the Commission's liability determination, such referrals are initiated by the courts, not the Commission.

213. We decline to adopt GST's proposal to establish special discovery rules for a supplemental complaint proceeding. A supplemental complaint is a formal complaint that is limited to the issue of damages because the issue of liability has already been determined in a separate, prior proceeding. Supplemental complaints are, therefore, subject to the formal complaint discovery rules.⁵⁹¹ We conclude that the formal complaint discovery rules are adequate to address damages claims and the creation of a separate set of discovery rules is unwarranted at this time.

K. Cross-Complaints and Counterclaims

214. The Act imposes new deadlines for actions on certain complaints ranging in length from ninety days to five months from the date of filing.⁵⁹² The *Notice* recognized that the filing of cross-complaints or counterclaims during a complaint proceeding could inhibit the Commission's ability to fully resolve disputes within the mandated time frames.⁵⁹³

1. The Notice

215. We proposed to allow compulsory counterclaims only if filed concurrently with the answer, such that the failure to file with the answer would bar the defendant from filing such compulsory counterclaim.⁵⁹⁴ We also proposed that a defendant electing to file permissive counterclaims and cross-claims would be required to file such pleadings concurrently with its answer, leaving the defendant with the option of filing any barred permissive counterclaims or cross-claims in a separate proceeding, provided that the statute of limitations has not run.⁵⁹⁵ We also proposed to revise our rules to clarify the applicability of filing fees to complaints, cross-complaints, and counterclaims.⁵⁹⁶

⁵⁹¹ See Appendix A, § 1.729.

⁵⁹² See, e.g., 47 U.S.C. §§ 208(b), 260(b), 271(d)(6)(B), 275(c).

⁵⁹³ *Notice* at 20855.

⁵⁹⁴ *Notice* at 20855.

⁵⁹⁵ *Notice* at 20855.

⁵⁹⁶ *Notice* at 20856.

2. Comment

216. CompTel and TRA support the Commission's proposals.⁵⁹⁷ Most commenters, however, oppose establishing a category of compulsory counterclaims that will be barred if not filed concurrently with an answer.⁵⁹⁸ AT&T, BellSouth, PTG, and NYNEX argue that the time to answer (twenty days) is insufficient to allow a defendant to answer the complaint, ascertain all possible counterclaims and prepare such counterclaims for filing and service in accordance with the proposed format and content requirements.⁵⁹⁹ GTE further argues that defendants may be reasonably unaware of their counterclaims prior to the date an answer is due.⁶⁰⁰ CBT, GST, KMC, and MFS suggest that compulsory counterclaims filed with the answer should not be subjected to the same high levels of evidentiary support as required of the complaint.⁶⁰¹ AT&T and NYNEX support a rule requiring counterclaims and cross-complaints not filed concurrently with the answer to be brought in separate proceedings.⁶⁰² CBT and U S West argue that the Commission's jurisdiction over counterclaims is limited to instances where both parties to a proceeding are carriers and the counterclaim involves an allegation of a violation by the complainant that could itself be the subject of a separate complaint before the Commission.⁶⁰³

3. Discussion

217. We require all cross-complaints and counterclaims to be filed as separate, independent actions.⁶⁰⁴ While the *Notice* originally proposed to distinguish between the treatment of compulsory and permissive cross-complaints and counterclaims, we have decided that banning all cross-complaints and counterclaims is necessary in light of the statutory deadlines in the 1996 Act. Cross-complaints and counterclaims would not be filed until twenty days into an ongoing proceeding, thereby shortening the time within which the Commission may adequately consider and resolve such claims. Establishing a category of compulsory counterclaims, furthermore, would have created an inconsistency between the treatment of claims by complainants and counterclaims by defendants. Under such a rule, complainants would be permitted to file separate formal complaints based on claims arising out of the same transaction or occurrence as a pending formal complaint, but defendants would be barred from filing counterclaims once the answer had been filed.⁶⁰⁵

⁵⁹⁷ CompTel Comments at 10; TRA Comments at 24.

⁵⁹⁸ See e.g., AT&T Comments at 11-12; NYNEX Comments at 13-14.

⁵⁹⁹ AT&T Comments at 11-12; BellSouth Comments at 18; NYNEX Comments at 13-14; PTG Comments at 27-28.

⁶⁰⁰ GTE Comments at 14.

⁶⁰¹ CBT Comments at 14-15; GST Comments at 19; KMC Comments at 19; MFS Comments at 19.

⁶⁰² AT&T Comments at 12; Nynex Comments at 14.

⁶⁰³ CBT Reply at 6; U S West Comments at 14; see also *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995).

⁶⁰⁴ See Appendix A, § 1.725.

⁶⁰⁵ See *supra* "Motions, Amendments to Complaints" section.

218. The rule we adopt also satisfies the concerns of some commenters that the Commission only has jurisdiction to consider those claims that the defendant could have filed against the complainant independent of the ongoing litigation. That is, the Commission does not have the authority to assert pendent jurisdiction over disputes for which no independent jurisdictional ground exists. In light of both the time constraints within which the Commission must work and the nature of allowable cross-complaints and counterclaims, we conclude that all such claims are better treated as individual complaints. To preclude the possibility of inconsistent rulings on identical facts, a complainant filing a formal complaint that shares any factual basis with another formal complaint to which the complainant is a party, whether ongoing or finally resolved, must include this fact in such formal complaint and its accompanying formal complaint intake form.⁶⁰⁶ We note that, under the broad powers of Section 208, the Commission always has the authority to consolidate separate complaint cases. Where appropriate, the staff will have discretion to consolidate cases so that all claims arising out of the same transaction or occurrence may be adjudicated in a single proceeding.

219. We decline to adopt our proposal to revise our rules to clarify the applicability of filing fees to cross-complaints and counterclaims. Such a rule would be moot in light of the rule adopted prohibiting all cross-complaints and counterclaims.

L. Replies

1. The Notice

220. We proposed to prohibit replies to answers unless specifically authorized by the Commission.⁶⁰⁷ We noted that our rules made filing a reply voluntary, and that failure to reply was not deemed to be an admission of any allegation contained in the answer, except for facts contained in affirmative defenses.⁶⁰⁸ We proposed to authorize replies only upon a complainant's motion, filed within five days of service of the answer,⁶⁰⁹ showing good cause to reply to any affirmative defenses supported by factual allegations that were different from any denials also contained in the answer.⁶¹⁰ We also proposed to provide that a complainant's failure to file a reply to an answer would be deemed a denial of any affirmative defenses.⁶¹¹

221. We also proposed to prohibit replies to oppositions to motions.⁶¹² We stated our belief that such replies seldom aid the Commission in resolving factual or legal issues and were often used to

⁶⁰⁶ See Appendix A, § 1.721(a)(12).

⁶⁰⁷ Notice at 20856.

⁶⁰⁸ Notice at 20856.

⁶⁰⁹ Notice at 20856.

⁶¹⁰ Notice at 20856.

⁶¹¹ Notice at 20856.

⁶¹² Notice at 20857.

repeat information already contained within the original motion itself.⁶¹³ We sought comment on this and any other alternative proposals.⁶¹⁴

2. Comments

222. Many commenters, including AT&T, BellSouth, GST, KMC, MFS, GTE, NYNEX, and TRA support our proposals to prohibit, in most instances, replies to defendants' answers.⁶¹⁵ They agree that replies are unnecessary and redundant as long as complainants are deemed to have denied all affirmative defenses and are permitted to respond for good cause, such as a showing that a defendant has misrepresented pertinent facts.⁶¹⁶ ATSI and the cable entities, however, argue that a reply is necessary to give a complainant the opportunity to respond to matters that might be raised for the first time in the answer and to withdraw claims that may have been satisfactorily addressed in the answer.⁶¹⁷ NYNEX argues that a complainant should be permitted to file a reply to an answer if it is replying to an affirmative defense and it is relying on factual allegations that are different from any denials contained in the answer.⁶¹⁸ ICG argues that prohibiting replies would generate more work for the Commission, in the form of responding to motions for leave to file replies.⁶¹⁹

223. Regarding our proposal to prohibit replies to oppositions to motions, PTG points out that Section 1.727(f) of the Commission's existing rules already prohibits replies to oppositions to motions.⁶²⁰ CompTel, GST, KMC, MFS, and GTE assert that replies to oppositions to motions may be warranted where the opposition distorts facts or where matters are raised for the first time in the opposition.⁶²¹

3. Discussion

224. We modify our proposed rule and permit complainants to file replies that respond only to affirmative defenses.⁶²² We shall deem any failure to reply to an asserted affirmative defense as an

⁶¹³ Notice at 20857.

⁶¹⁴ Notice at 20857.

⁶¹⁵ AT&T Comments at 13; BellSouth Comments at 19; GST Comments at 20; KMC Comments at 19-20; MFS Comments at 19-20; GTE Comments at 14; TRA Comments at 24.

⁶¹⁶ AT&T Comments at 13; BellSouth Comments at 19; GST Comments at 20; KMC Comments at 19-20; MFS Comments at 19-20; GTE Comments at 14; TRA Comments at 24.

⁶¹⁷ ATSI Comments at 18; Cable Entities Reply at 8-9.

⁶¹⁸ NYNEX Comments at 14.

⁶¹⁹ ICG Comments at 22.

⁶²⁰ PTG Comments at 28.

⁶²¹ CompTel Comments at 10; GST Comments at 20; KMC Comments at 20; MFS Comments at 20; GTE Comments at 14.

⁶²² See Appendix A, § 1.726(a).

admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.⁶²³ We note that the *Notice* originally proposed to require parties to move for leave to file replies to affirmative defenses and that failure to reply to an affirmative defense would be deemed a denial of such defense. The rule we adopt departs from our proposal in the *Notice* because we are persuaded by the commenters that requiring complainants to seek leave to file replies to affirmative defenses is likely to generate unnecessary work for the staff. Instead, we have chosen to limit replies to those that respond to new allegations raised in an answer in the form of affirmative defenses. Complainants will be required to support their replies to affirmative defenses in the same manner that they are required to support their claims in the complaint.⁶²⁴ This requirement will aid the staff by the presentation of specific evidence regarding each affirmative defense. General replies to answers, however, are often redundant and unnecessary because complainants simply repeat claims that were filed with the original complaint. Such general replies are prohibited. We do not modify the existing rule that prohibits replies to oppositions to motions.

M. Motions

225. The *Notice* proposed to modify the rules pertaining to motions in order to enhance the efficiency of the formal complaint process, expedite the filing and consideration of motions, and eliminate unnecessary or duplicative pleadings.⁶²⁵

1. The Filing of Motions

a. The Notice

226. In the *Notice*, we proposed to require a party filing a motion to compel discovery to certify that it had made a good faith attempt to resolve the matter before filing the motion.⁶²⁶ We also proposed to eliminate motions to make the complaint "definite and certain," stating that, under the proposed rules, complaints would have to be very definite and certain to avoid being dismissed at the outset.⁶²⁷

b. Comments

227. All parties that commented on this issue agree that the Commission should require certification of good faith attempts to resolve discovery disputes informally as a condition to the filing of any motion to compel.⁶²⁸ Commenters also support the proposal to eliminate motions to make a complaint

⁶²³ See Appendix A, § 1.726(b).

⁶²⁴ See Appendix A, § 1.726(c)-(e).

⁶²⁵ *Notice* at 20857.

⁶²⁶ *Notice* at 20857.

⁶²⁷ *Notice* at 20857.

⁶²⁸ See, e.g., AT&T Comments at 14; GTE Comments at 14; TRA Comments at 24.

more definite and certain.⁶²⁹ BellSouth supports eliminating motions to make complaints "definite and certain" as long as the Commission will consider motions to dismiss for failure to state a claim or failure to comply with procedural requirements.⁶³⁰

c. Discussion

228. We require a party that files a motion to compel answers to discovery requests to certify that it has made a good faith attempt to resolve the matter before filing the motion.⁶³¹ We conclude, and commenting parties agree, that adoption of this rule will limit Commission involvement in conflicts that may be easily resolved by the parties themselves.

229. Motions to make the complaint "definite and certain" are prohibited,⁶³² as such motions should be superfluous under the new format and content requirements for initial pleadings. BellSouth's suggestion that the Commission consider motions to dismiss is inapposite to our decision to eliminate motions to make a complaint "definite and certain." The rationale for eliminating motions to make complaints more "definite and certain" is that our newly-adopted stringent pleading requirements will ensure the filing of complaints that are "definite and certain." We do not intend to prohibit the filing of motions to dismiss a complaint for failure to state a claim or failure to comply with procedural requirements.

2. Oppositions To Motions

a. The Notice

230. In the *Notice*, we stated our intent to expedite further formal complaint proceedings by modifying the rules regarding oppositions to motions.⁶³³ We proposed to make failure to file an opposition to a motion possible grounds for granting the motion,⁶³⁴ although the filing of oppositions to motions would remain permissive.⁶³⁵ Additionally, we proposed to shorten the deadline for filing oppositions to motions from ten to five business days.⁶³⁶

b. Comments

⁶²⁹ See, e.g., AT&T Comments at 13-14; TRA Comments at 24-25.

⁶³⁰ BellSouth Comments at 19.

⁶³¹ See Appendix A, § 1.727(b).

⁶³² See Appendix A, § 1.727(g).

⁶³³ *Notice* at 20857.

⁶³⁴ *Notice* at 20857.

⁶³⁵ *Notice* at 20857.

⁶³⁶ *Notice* at 20857.

231. GST, KMC, MFS, NYNEX, and SWBT support the proposal to make failure to file an opposition to a motion possible grounds for granting the motion, arguing that it is reasonable to require a party to articulate its reasons for opposing a motion.⁶³⁷ ACTA, however, opposes such a proposal, arguing that if the failure to file an opposition can be grounds for granting a motion, the filing of an opposition will not be permissive in any real sense.⁶³⁸ AT&T warned that failure to file an opposition to a motion should not be an automatic basis for granting the motion.⁶³⁹

232. Many commenters, including AT&T, BellSouth, GTE, PTG, SWBT, and TRA, support the shortening of the period to file an opposition to a motion to five business days.⁶⁴⁰ GTE suggests that the rules provide a procedure to seek an extension of time to oppose a motion when circumstances warrant it.⁶⁴¹ PTG suggests that motions be served by facsimile to give parties more time to respond.⁶⁴² CBT opposes the shortening of time, arguing that more time is needed to respond to complex motions, and suggests instead that the time for filing be reduced to ten calendar days rather than five business days.⁶⁴³

c. Discussion

233. A party's failure to file an opposition to a motion is possible grounds for granting such motion.⁶⁴⁴ We note that the commenters misconstrue the meaning of the statement that it is "permissive" to file an opposition to a motion. This statement merely means that the Commission does not require a party to take affirmative steps to oppose a motion against it. This rule does not, however, alleviate any party's burden to represent fully its own interests before the Commission. Any party that chooses not to file an opposition to a motion runs the risk that the motion will be granted without consideration of that party's views. Because the Commission is prohibited from acting in an arbitrary and capricious manner, staff will not grant unopposed motions that are frivolous, inconsistent with the Commission's rules, or that may create unnecessary delay.

234. The deadline to file an opposition to a motion is five business days, with the time running from the date service is effective.⁶⁴⁵ Reduction of the number of days a party has to respond to a motion

⁶³⁷ GST Comments at 21; KMC Comments at 21; MFS Comments at 21; NYNEX Comments at 15; SWBT Comments at 12.

⁶³⁸ ACTA Comments at 8.

⁶³⁹ AT&T Comments at 14, n. 13.

⁶⁴⁰ AT&T Comments at 17; BellSouth Comments at 19; GTE Comments at 15; PTG Comments at 29; SWBT Comments at 12; TRA Comments at 25.

⁶⁴¹ GTE Comments at 15.

⁶⁴² PTG Comments at 29.

⁶⁴³ CBT Comments at 15.

⁶⁴⁴ See Appendix A, § 1.727(e).

⁶⁴⁵ See Appendix A, § 1.727(e).

will speed up the motions process. We disagree with CBT's suggestion to use ten calendar days rather than five business days to determine filing due dates because we find that a reduction to ten calendar days will not save sufficient time in light of the statutory deadlines in the Act. Five business days will provide the opposing party with seven calendar days to prepare, file and serve an opposition, with exceptions for when a holiday falls in the five business day period. Ten business days would provide the opposing party with fourteen calendar days to prepare, file and serve an opposition, with exceptions for when a holiday falls in the ten business day period. In contrast to this, CBT's proposed ten calendar days would provide the opposing party with ten to thirteen calendar days, depending on the day of the week the motion is served and filed and the existence of holidays. In response to PTG's suggestion that motions be served by facsimile, we note that this proceeding adopts rules requiring service of motions by hand-delivery, overnight delivery, or facsimile transmission followed by mail delivery.⁶⁴⁶

3. Format, Content, and Specifications of Motions and Orders

a. The Notice

235. To ease the burden on Commission staff in drafting decisional documents within short time frames, the *Notice* proposed to require all pleadings seeking Commission orders to contain proposed findings of fact and conclusions of law with supporting legal analysis.⁶⁴⁷ The *Notice* also proposed that all parties submit with their procedural or discovery motions and oppositions to such motions, proposed orders, in both hard copy and disk, that incorporate the legal and factual bases for granting the requested relief.⁶⁴⁸ The *Notice* proposed that the computer disk submissions be formatted in WordPerfect 5.1, the wordprocessing system currently used by the Commission.⁶⁴⁹ Furthermore, we proposed to require parties to conform the format of any proposed order to that of a reported FCC order.⁶⁵⁰ Such proposals would reduce the burden on Commission staff in drafting orders and letter rulings by enabling the staff to either incorporate relevant portions of the parties' submissions into the required orders or use the parties' submissions in their entirety.⁶⁵¹

b. Comments

236. ACTA and BellSouth agree with the proposal to require all pleadings seeking Commission orders to contain proposed findings of fact and conclusions of law with supporting legal analysis.⁶⁵² ACTA states that the added cost to the parties of such submissions would be offset by the value of such

⁶⁴⁶ See Appendix A, § 1.735(f).

⁶⁴⁷ *Notice* at 20840.

⁶⁴⁸ *Notice* at 20840.

⁶⁴⁹ *Notice* at 20840.

⁶⁵⁰ *Notice* at 20840.

⁶⁵¹ *Notice* at 20840.

⁶⁵² ACTA Comments at 4; BellSouth Comments at 12.

filing in expediting the resolution of cases.⁶⁵³ On the other hand, MCI, PTG, and CBT argue that such inclusions would only be appropriate for certain pleadings, such as briefs or motions for summary judgment, because parties may be unprepared to make such conclusions prior to conducting discovery and reviewing opposing pleadings.⁶⁵⁴

237. Commenters generally did not oppose the proposals to require parties making or opposing procedural or discovery motions to submit proposed orders, in both hard copy and disk, that conform to the format of reported FCC orders.⁶⁵⁵ CBT additionally suggests that parties be allowed to submit proposed orders in formats other than WordPerfect 5.1.⁶⁵⁶ MCI opposes requiring parties to submit proposed orders with their motions and oppositions proposal, arguing that such a rule will be largely inapplicable because most motions will be discovery motions, which are resolved by informal letter orders that are not in the format of Commission orders.⁶⁵⁷ NAD argues that this proposal will be too burdensome for consumers with disabilities.⁶⁵⁸

c. Discussion

238. After consideration of the comments received, we modify the rule proposed and will require only those pleadings seeking dispositive orders to contain proposed findings of fact and conclusions of law with supporting legal analysis.⁶⁵⁹ We define a dispositive order as an order that finally resolves one or more claims in a complaint.⁶⁶⁰ We conclude that this requirement is justified in these limited circumstances because it will help to ensure that issues and arguments are better framed and presented to the Commission. We agree with MCI, PTG, and CBT that such a requirement would not be appropriate for interlocutory motions, such as those seeking discovery or extensions of time. Requiring complete support for dispositive motions will decrease substantially the number of unnecessary motions filed with the Commission because parties will be reluctant to file motions for which they have no factual or legal basis. This requirement will also give Commission staff the option of incorporating the proposed findings of fact and conclusions of law with supporting legal analysis into orders, thereby easing the burden of drafting orders.

⁶⁵³ ACTA Comments at 4.

⁶⁵⁴ MCI Comments at 16; PTG Comments at 11; CBT Comments at 9.

⁶⁵⁵ *See, e.g.*, BellSouth Comments at 12.

⁶⁵⁶ CBT Comments at 9.

⁶⁵⁷ MCI Comments at 16.

⁶⁵⁸ NAD Reply at 5.

⁶⁵⁹ *See* Appendix A, § 1.727(b)

⁶⁶⁰ An example of a dispositive order is an order granting a motion for summary judgment. For an order to be considered dispositive, it is not necessary that it be a final appealable order by the Commission.

239. To further facilitate the drafting of orders and letter rulings, we adopt our proposals to require parties to submit with their procedural or discovery motions and oppositions to such motions, proposed orders, in both hard copy and disk, that incorporate the legal and factual bases for granting the requested relief.⁶⁶¹ Although some commenters argue that such a requirement may often be inapplicable to discovery and too burdensome for persons with disabilities, we conclude that the benefits of such a rule justify it.⁶⁶² The Commission anticipates addressing a large number of complaints on an expedited basis. In light of the Commission's limited resources, it will be of great assistance to Commission staff to have the relief sought or opposed by motion, and the basis therefore, set out clearly and concisely in a proposed order format. Having such a proposed order, in hard copy and on disk, will assist in the timely release of orders or letter rulings on motions. Requiring a party to articulate the relief sought in an order may also produce more clearly focused arguments. We also conclude that this requirement does not overly burden parties, who merely have to transfer a portion of the text of their motions or oppositions into the format of an order. Finally, if submission of such a draft order does place a large burden on a particular party, the staff retains the discretion to waive this requirement on a case-by-case basis.

240. We modify our proposed rule concerning the submission of proposed orders on disk.⁶⁶³ We require that computer disk submissions be formatted in the Commission's designated "wordprocessing program," rather than specifically "WordPerfect 5.1," because the Commission may decide to utilize different software in the future. We also decline to adopt CBT's proposal to permit parties to submit documents in alternative wordprocessing formats. Because of conversion difficulties, parties will not be permitted to submit documents in any wordprocessing format not used by the Commission. The staff has discretion to grant waivers of this requirement to parties upon a showing that such wordprocessing program is unavailable to them.

4. Amendments To Complaints

a. The Notice

241. We stated in the *Notice* that compliance with deadlines in the Act requires that a complaint be fully developed prior to filing.⁶⁶⁴ In furtherance of this goal, we proposed to prohibit the amendment of complaints except for changes necessary under 47 C.F.R. § 1.720(g), which requires that information and supporting authority be current and updated as necessary in a timely manner.⁶⁶⁵ This would preclude a complainant from introducing new issues late in the development of the case.⁶⁶⁶

⁶⁶¹ See Appendix A, § 1.727(c), (d).

⁶⁶² The rules adopted in this proceeding will not apply to complaints filed pursuant to Section 255 of the Act. See *Section 255 NOI*.

⁶⁶³ See Appendix A, § 1.734(d).

⁶⁶⁴ *Notice* at 20858.

⁶⁶⁵ *Notice* at 20858.

⁶⁶⁶ *Notice* at 20858.